RICHARD DONNELLY

IBLA 73-155 Decided June 20, 1973

Appeal from the decision of the New Mexico State Office cancelling oil and gas lease NM 16588 for multiple filings.

Affirmed as modified.

Oil and Gas Leases: Applications: Drawings--Oil and Gas Leases: Cancellation

> An interest which an oil and gas lease applicant has in the offer of another applicant for the same land in a drawing of simultaneously filed noncompetitive lease offers which gives the first applicant, in effect, 1-1/5 chances of success in the drawing is inherently unfair whether or not there has been collusion or intent to deceive the Department, and a lease which has issued to such an applicant is properly canceled when the underlying facts are discovered.

APPEARANCES: Robert C. Bledsoe, Esq., of Stubbeman, McRae, Sealy, Laughlin & Browder, Midland, Texas, for appellant.

OPINION BY MR. HENRIQUES

Richard Donnelly appeals from the decision of the New Mexico State Office, Bureau of Land Management, dated September 12, 1972, canceling his oil and gas lease NM 16588 on the ground that he had violated the regulations forbidding multiple filings. Appellant was the successful offeror in the July 1972 simultaneous drawing. The State Office issued a lease to the appellant on August 9, 1972, effective September 1, 1972. Subsequent thereto questions arose as to the legitimacy of the lease offer. It was discovered that the appellant owned more than 20 percent of the stock of the Eastland Oil Company, a Texas corporation authorized to hold oil and gas leases. Appellant also was a Vice-President of Eastland. The Eastland Oil Company had filed an offer to lease the same acreage on which appellant eventually acquired a lease. Further, George A. Donnelly, Jr., another Vice-President of Eastland Oil Company, also filed a lease offer. The State Office decision, relying on the

doctrine of corporate opportunity, held that since Donnelly, if he were to win, would hold the lease as a constructive trustee for Eastland, the separate filings by each constituted a multiple filing.

Appellant contends that there is no evidence that he acted for or on behalf of Eastland, and that, in actual fact, he did not. He argues that the mere finding of a fiduciary duty flowing from himself to Eastland does not establish that he usurped a corporate opportunity by participating in the drawing, as the right of Eastland's officers to participate in their own behalf was part of the basis of their employment. In support thereof, he has provided this Board with copies of two resolutions, one by Eastland's Board of Directors, and the other by all of the shareholders, affirming unanimously that the officers and directors of Eastland are permitted to participate for their own accounts in transactions pertaining to oil and gas leases. Finally, appellant contends that nothing in McKay v. Wahlenmaier, 226 F.2d 35 (D.C. Cir. 1955), requires cancellation of his lease.

McKay v. Wahlenmaier, supra, involved a simultaneous drawing for an oil and gas lease in which one E. A. Culbertson and one Wallace W. Irwin filed offers for the same tract. Both were officers and substantial stockholders in Culbertson & Irwin, Inc., a New Mexico organization engaged in the oil and gas business. Culbertson & Irwin, Inc., also filed an offer to lease. Culbertson's personal application was the first offer drawn, and a lease was issued to him. Wahlenmaier, whose offer had been drawn second, protested on the ground that Culbertson was not a qualified applicant. Three separate factors were alleged as disqualifying Culbertson's offer: 1) Culbertson had failed to disclose his indirect interests in his corporation's federal leases as required by the regulations; 2) Culbertson had more than one chance because of the collusive filing of three applications, contrary to Departmental policy of giving each applicant one chance; and 3) Culbertson swore falsely that he was the sole party in interest because he was actually applying on behalf of his corporation.

The Secretary of the Interior in his decision, noted that Culbertson's failure to disclose his interests as a shareholder in his corporation's oil and gas leases violated the regulation and rendered it defective. He found this failure harmless, however, since his prorated acreage did not exceed the statutory limit. As related to the second contention the Secretary held that Culbertson and Irwin did have more than one chance, and that it would have been proper to exclude their cards from the drawing, had the underlying facts been known at an appropriate time. On the other hand, the lease having issued, the Secretary held he had no authority to cancel

the lease for such a cause. Finally, the Secretary noted that the mere fact that Culbertson was an officer did not mean that he was necessarily acting on behalf of the corporation. The United States District Court for the District of Columbia reversed the Secretary on all three grounds, and the Circuit Court affirmed.

As regards the first ground pressed by Wahlenmaier, the court held that the Secretary was bound by his regulations and that Culbertson's failure to provide the needed information precluded a finding that he was a qualified applicant. 226 F.2d at 40-41. The court agreed that Culbertson and Irwin each possessed more than one chance in the drawing, and held that not only was the Secretary empowered to order cancellation of the lease for such violations, he was required to cancel the lease. Id. at 43. Finally, the Court said that regardless of whether an agreement existed between Culbertson and his company as to acquiring the lease on its behalf, under the general rule of usurpation of a corporate opportunity Culbertson would hold the lease as constructive trustee for his company and was thus obligated to indicate that the company was a party in interest on his application card. The court noted that there was no New Mexico authority relating to such a situation but added "We may safely assume it would follow the general rule which is just and salutary." Id. at 46. We would note, here, that the by-laws of the corporation authorized its officers to hold oil and gas leases in their individual capacities. See Raymond J. Stipek, 74 I.D. 57, 60 n.3 (1967). The court, however, did not discuss this factor in its decision.

Extended analysis of McKay v. Wahlenmaier, supra, was necessary to point out the error in the decision below. That decision held that "[t]he officer, if successful, would hold his lease as a constructive trustee for the corporation, therefore, the corporation would have two opportunities in the drawing." The decision below confused the issue of whether appellant was a constructive trustee for Eastland, and hence had violated the regulations relating to disclosure of other parties, with the question of whether appellant had more than one chance to win the lease and had thus violated the regulations prohibiting multiple filings. This confusion is understandable since one of the purposes underlying disclosure of other parties in interest is to avert multiple filings. But a person may violate the sole party in interest rule without making multiple filings. And by the same token, multiple filings can occur without any violation of the party in interest disclosure requirement. This differentiation is important since we believe that quite apart from a finding that appellant was a constructive trustee for Eastland, appellant violated the multiple filing prohibition.

Appellant owns more than 20 percent of the stock of Eastland. Appellant is also a Vice-President of the company. His large share of stock together with his management position indicates that in actual fact appellant had not less than 1-1/5 chances of prevailing in the lease drawing. The present fact situation is closely analogous to Schermerhorn Oil Corp., 72 I.D. 486 (1965). In that case two companies, Schermerhorn Oil Corporation and Kenwood Oil Company, filed offers for a particular tract. Schermerhorn owned 29 percent of the stock of Kenwood. Both offers were rejected. The rationale for rejecting Schermerhorn's offer was that this allowed Schermerhorn more than one chance, regardless of whether there was any collusion between the two companies. Id. at 490. We adhere to the rule enunciated in Schermerhorn, supra. It is not necessary to pass on the correctness of the State Office's decision that appellant was a constructive trustee for Eastland.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

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Douglas E. Henriques, Member

We concur:

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Newton Frishberg, Chairman

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Anne Poindexter Lewis, Member